

July 28, 2016

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: WC Docket No. 12-375 – ICSolutions’ Comments on the FCC Fact Sheet, issued July 14, 2016

Dear Secretary Dortch,

On July 28, 2016, Inmate Calling Solutions, LLC (“ICSolutions”), represented by Tim McAteer, ICSolutions’ President, and Charlena Aumiller, Esq., CPA, Documentations Department, met with the following persons: Stephanie Weiner, Legal Advisor to Chairman Wheeler, Claude Aiken, Legal Advisor to Commissioner Clyburn, Madeleine V. Findley, Deputy Chief, Wireline Competition Bureau; and with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel in a second meeting. The subject of both meetings was Mr. Michael Hamden’s Petition for Partial Reconsideration, filed January 19, 2016 in this Docket 12-375, and the Commission’s decision to consider an Order on Reconsideration at its Public Meeting on August 4, 2016. During the meeting, discussions included points raised in our previous filings,¹ as well as the points provided below.

We support the rate caps in the FCC’s recent Fact Sheet, so long as the new rules do not limit how investors utilize their profits, such as sharing profits with facilities in the form of site commissions or providing other technologies beyond what is necessary to provide secure inmate calling. With the information provided in the Fact Sheet and otherwise known at this time, ICSolutions can operate and receive fair compensation with the proposed rate caps.

We commend the FCC’s approach to rate reform by considering the end result of the overall costs to consumers, rather than the means to the end of how providers utilize their profits. ICSolutions, other providers, correctional facilities, and consumer advocates have supported this approach throughout this proceeding. Other providers and Mr. Hamden argue that rate reform

¹ *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375 (filed Feb. 26, 2016); *ICSolutions’ Notice of Permitted Ex Parte Meetings and Comments on the FCC Fact Sheet, issued September 30, 2015*, FCC W.C. Docket No. 12-375 (filed Oct. 15, 2015); *Comments of Inmate Calling Solutions, LLC*, FCC W.C. Docket No. 12-375 (filed Jan. 12, 2015).

can occur only if commissions are prohibited or strictly limited.² As we have stated in multiple filings, providers will likely continue to charge the higher end of the cap, regardless if a provider keeps all of the calling revenue.³ And that is exactly what is happening now. Most, if not all, providers are charging the rate cap on interstate rates at correctional facilities. Some of the providers are keeping all the revenue associated with interstate calling, while other providers, like ICSolutions, are continuing to share profits. In practice, when providers are all charging the same rate caps, the cost to consumers are unaffected by whether the provider shares its profits or keeps the revenue. Given the practical results of rate caps, Mr. Hamden has yet to demonstrate how rate reform through prohibiting or limiting commissions will benefit the competitive process and industry stakeholders, like correctional facilities, called parties, inmates, and providers, particularly when it is clear that the rate and fee caps drive the charges to the consumers.

The FCC is taking the lawful and correct approach to rate reform by setting overall rate caps rather than attempting to regulate individual management decisions, such as how investors utilize their profits. Such a task is infeasible, unsupported by precedent, and exceeds the statutory authority of the FCC to regulate just and reasonable rates, as well as fair compensation.⁴ Indeed, even when utilities must undergo the traditional rate-of-return regulation, the public commissions' role is to determine the just, reasonable, and fair costs to provide service, not to make management decisions of how a utility spends its revenue or utilizes its profits.

The inmate telephone service ("ITS") providers appealing the *2015 Order* ("Appellants") on the basis that the rate caps were too low to cover their costs may still take issue with the proposed rate caps. Given that many of these appellants offered to not challenge the lower rates in the *2015 Order* as long as the FCC prohibited or limited commissions,⁵ it is reasonable to conclude

² See e.g., Global Tel*Link Corp., Securus Technologies, Inc., Telmate, LLC, & Pay Tel Communications, Inc., *Notice of Ex Parte*, pg. 2 (filed Oct. 15, 2015) ("The parties believe that adoption of a clear and final site commission mechanism is the most important aspect of the forthcoming order . . ."); Michael Hamden, *Rates for Interstate Inmate Calling Services*, FCC W.C. Docket 12-375, pg. 2 (filed July 22, 2016).

³ *Comments of Inmate Calling Solutions, LLC*, FCC W.C. Docket No. 12-375, pg. 14 (filed Jan. 12, 2015); *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, pg. 7 (filed Feb. 26, 2016).

⁴ For further discussion on how regulating commissions exceeds the FCC's statutory authority, please refer to *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, Part I.A. (pgs. 3-6) (filed Feb. 26, 2016). For further discussion on the infeasibility of regulating commissions, please refer to *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, Parts I.A (pgs. 3-6) & I.C (pgs. 6-7) (filed Feb. 26, 2016); see also *Global Tel*Link v. Federal Communications Commission*, Joint Brief for the ICS Carrier Petitioners, USCA Case No. 15-1461, pg. 56 (D.C. Cir., June 6, 2016) ("That definition [of site commissions] is nonsensical – under its literal terms, if an ICS provider bought coffee and donuts for its own employees and paid sales tax, that would constitute a site commission.").

⁵ GTL, Securus, Telmate *Notice of Ex Parte*, pg. 2 (filed Oct. 15, 2015) ("If, however, the FCC issues an order that (a) adopts the rate caps and fees stated in the [Oct. 2015] Fact Sheet, and (b) establishes a maximum site commission in the form of a per-minute, capped additive rate, consistent with the Lipman proposal, the companies will not seek judicial review of these matters.").

that these providers can operate and receive fair compensation under these new higher rates, and are simply trying to have the FCC eliminate one method of competition. Such a result directly contradicts with the express statutory purpose of increasing competition, as provided in the Communications Act of 1934, as amended for the Telecommunications Act of 1996.⁶ After all, it is up to the provider as to whether or not they elect to share a portion of their profits with the facility in the form of commissions or other technologies beyond what is necessary to provide secure inmate calling. Providers that push to prevent other providers from sharing a portion of their profits in the form of commissions or other technologies are likely doing so for the purpose of eliminating competition. Some providers argue that state or local laws are requiring them to pay commissions, and without the FCC's limit or prohibition on commissions, the providers cannot receive fair compensation.⁷ When a state or local law, rule, ordinance, or contract prevents the provider from being able to receive fair compensation, such as some laws requiring a certain amount of commissions, such requirements would be inconsistent with the FCC's rules and, therefore, preempted.⁸

Moreover, while many of the Appellants allege their costs are higher than the rate caps, the law requires more than a submission of costs before being entitled to recovery. The costs must also be proven to be just, reasonable, and fair costs necessary to provide service.⁹ When it comes to cost of service, management decisions can greatly impact discretionary costs, such as additional technology unnecessary to provide secure inmate calling. While the costs to install and operate a basic inmate phone system may be relatively consistent among the providers, the providers' investment in capital or other discretionary costs can vary greatly. The law requires providers receive fair compensation for each and every call, but it does not mandate that the FCC impose regulations that foster inefficient management decisions.¹⁰ Congress' use of the term "fair

⁶ Communications Act of 1934, 42 U.S.C. 276(b)(1) ("In order to promote competition among payphone service providers . . ."); see also *ICSolutions' Notice of Permitted Ex Parte Meetings and Comments on the FCC Fact Sheet, issued September 30, 2015*, FCC W.C. Docket No. 12-375, pgs. 6-9 (filed Oct. 15, 2015); *Comments of Inmate Calling Solutions, LLC*, FCC W.C. Docket No. 12-375, Part IV (pgs. 15-17) (filed Jan. 12, 2015).

⁸ *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, pgs. 13-14 (filed February 26, 2016).

⁹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989) ("[A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. 'It is not theory, but the impact of the rate order which counts.' The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding." (internal citations omitted)).

¹⁰ Communications Act of 1934, 42 U.S.C. 276(b)(1)(A) ("[T]he Commission shall take action necessary (including any reconsideration) to prescribe regulations that -- (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . ."); see also *ICSolutions' Notice of Permitted Ex Parte Meetings and Comments on the FCC Fact Sheet, issued September 30, 2015*, FCC W.C. Docket

compensation,” as opposed to term “just and reasonable rates,” does not mean Congress intended to give ITS providers a blank check of charging any rates above a floor set by the FCC. Rather, “just and reasonable rates” have historically been used in the context of rates charged directly to consumers. Thus, it is more plausible that Congress used the term “fair compensation” in recognition that payphone providers may be compensated from other vendors who ultimately charge consumers, rather than receiving from rates charged directly to the consumers.

Many of these Appellants have not met their burden of proof by failing to show why their costs are higher and, more importantly, why those excess costs are just, reasonable, and fair. For example, Securus argues in its appeal that the FCC cannot ignore Securus’s submitted capital for single-pay calls on the basis that they were the only ones to provide costs and, therefore, the FCC must consider them.¹¹ To our knowledge, Securus never explained why the costs were that high, which is a particularly obvious question since none of the other providers had similar costs to submit. Rather, Securus’s argument is seeking to shift the provider’s burden of proof to demonstrate the just, reasonable and fair costs to the FCC – that the FCC must disprove Securus’s costs. Moreover, while providers submitted their costs, it must be remembered that costs which benefit the shareholders, such as lobbying costs, some advertising costs, commissions, etc., should not be passed through to ratepayers.¹² Likewise, it is axiomatic that it is inappropriate to pass through in ITS rates, the costs unnecessary for the provision of secure inmate calling services, such as cell detection, or costs incurred to grow or otherwise benefit unregulated operations, such as grievance filing or electronic medical reporting.¹³

One point that Mr. Hamden raised in his Petition, and is unclear as to whether the FCC will address, is how the FCC’s rules apply to single-pay calls. ICSolutions reiterated that it is unnecessary to have an uncapped pass-through mechanism for third party transaction fees that is different than the capped fees permitted for transactions processed by ITS providers,¹⁴ and discussed the points addressed on this point in its Opposition to Mr. Hamden’s Petition.¹⁵ In addition to those points, it should be noted for the record that, since the rules have become effective, the single-pay calls are still being charged at \$14.99 for a 15-minute call, **even on**

No. 12-375, pgs. 6-9 (filed Oct. 15, 2015); *Comments of Inmate Calling Solutions, LLC*, FCC W.C. Docket No. 12-375, Part IV (pgs. 15-17) (filed Jan. 12, 2015).

¹¹ *Global Tel*Link v. Federal Communications Commission*, Separate Brief of Petitioner Securus Technologies, Inc. (Public Version), USCA Case No. 15-1461, pg. 56 (D.C. Cir., June 6, 2016).

¹² *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, pgs. 5-6 (filed Feb. 26, 2016).

¹³ See *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, pg. 5 (filed Feb. 26, 2016)

¹⁴ *ICSolutions’ Notice of Permitted Ex Parte Meetings and Comments on the FCC Fact Sheet, issued September 30, 2015*, FCC W.C. Docket No. 12-375, pgs. 9-10 (filed Oct. 15, 2015). For example, Western Union is providing walk-in payment services for ICSolutions and charging the consumers only \$5.50, which is below the \$5.95 cap for live agent payment services. ICSolutions does not need any special considerations for third-party payment services and strongly believes they should be capped at the same payment services caps applicable to the inmate phone providers.

¹⁵ *Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration*, FCC W.C. Docket No. 12-375, Part III (pgs.16-17) (filed Feb. 26, 2016).

interstate calls. Per the website, these charges are still \$13.19 for a transactional fee, and \$1.80 for the per-call usage fee.¹⁶ Also, to the best of our knowledge, the transaction fees are being charged by subsidiaries of an ITS provider.¹⁷ As pointed out in our Opposition to Mr. Hamden's Petition, the related-party subsidiary is subject to the same rules as its parent ICS provider. If the same rules do not apply, ITS providers can set up subsidiaries for all types of transactions to simply bypass any caps set by the FCC. Moreover, ICSolutions is unclear how the usage charges are lawful since, even though § 64.6020(b) (2) has been stayed, likely because it referenced the rate caps in § 64.6010 that were also stayed, the rules prohibiting flat-rate calling (§ 64.6090) and per-call surcharges (§ 64.6080) remain in effect. Thus, by operation of the rules, the interstate call should be charged by the minute, and those per-minute rates cannot exceed \$0.21 for prepaid collect interstate calls. Addressing Mr. Hamden's Petition for Partial Reconsideration on this point could clarify the current operation of the rules and help ensure compliance.

ICSolutions is complying with the effective rules from the *2015 Order*, as well as the *2013 Order*, and will continue to comply with the FCC's rules. Moreover, while other providers are charging much higher intrastate rates, including \$5.90 for the first minute and \$1.19/minute for each subsequent minute (*i.e.*, \$22.56 for a 15-minute call),¹⁸ ICSolutions has moved our intrastate calling rates to align with the interstate per-minute rate caps. It is ICSolutions' understanding that, even though the rule capping intrastate rates (§ 64.6010) was stayed, the higher first minute rate is the equivalent of *de facto* a per-call surcharge. Indeed, how can the first minute charge be higher than any other minute of the call, and such discrepancy not qualify as a per-call surcharge? In addition, it is ICSolutions' experience that the phone number no longer reliably represents the actual geographical location of the caller. With this mobile society, a called party with a local number can easily take a call from across state lines, making the call technically an interstate call. In addition, with the current technology, the cost of intrastate calling is the same as the cost for interstate calling and, therefore, it seems unjust, unreasonable, and unfair to charge in-state calls a different rate than interstate calls.

In summary, ICSolutions does not oppose the rate caps so long as the FCC will continue to avoid regulating how providers can utilize their profits.

¹⁶ See Appendix 1 for the current website of the Securus's PayNow™ single-pay call service.

¹⁷ See Appendix 2 to see how the U.S. Patent and Trademark Office has Securus as the owner of the registered trademark Text Collect®, which is shown as the Copyright holder at the bottom of the website for PayNow™, per Appendix 1.

¹⁸ See Appendix 3 for the rates charged for prepaid intrastate calls at Benzie County, PA and other facilities, obtained from Securus's Rate Quote, available for all correctional facilities served by Securus at <https://securustech.net/call-rate-calculator>. Per ICSolutions' research of facilities in several states, Benzie County is just one of many facilities that pay more for the first minute than other minutes, and more than \$10.00 for a 15-minute call.

Thank you,

A handwritten signature in blue ink, appearing to read "Tim McAteer", with a horizontal line extending from the end.

Tim McAteer
President, ICSolutions

Copy via email to:

Chairman Tom Wheeler

Commissioner Mignon Clyburn

Commissioner Jessica Rosenworcel

Stephanie Weiner, Legal Advisor to Chairman Wheeler

Claude Aiken, Legal Advisor to Commissioner Clyburn

Travis Litman, Legal Advisor to Commissioner Rosenworcel

Madeleine V. Findley, Deputy Bureau Chief